

Yelavarthy (Migration) [2023] AATA 2153 (26 June 2023)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Rajesh Yelavarthy
REPRESENTATIVE:	Mr Jayapal Reddy Vadlakonda (MARN: 0957482)
CASE NUMBER:	2207710
HOME AFFAIRS REFERENCE(S):	BCC2020/2033909
MEMBER:	Wendy Banfield
DATE:	26 June 2023
PLACE OF DECISION:	Canberra
DECISION:	The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 26 June 2023 at 11:10am

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – false or misleading information – bogus document – education loan document – unknowingly – responsibility to ensure genuineness – waiver of requirement – decision under review affirmed

3.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 500.217; Scheduled 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 16 May 2022 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicant applied for the visa on 5 August 2020. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217(1) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because there was evidence before the Minister that the applicant provided, or caused to be provided, false or misleading information in a material particular or a bogus document in relation to the visa application.
6. The applicant appeared before the Tribunal on 10 May 2023 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Telugu and English languages.
7. The applicant was represented in relation to the review. The representative attended the Tribunal hearing.
8. Prior to the hearing, the applicant provided the following submissions:
 - Department of Home Affairs (the Department) notification and decision record dated 16 May 2022.
 - Applicant's Indian passport biometric information.
 - Response to the Tribunal's invitation to comment on s.375 non-disclosure certificate dated 27 April 2023.
 - Applicant's written submission dated 3 May 2023 attaching the applicant and parents' identity information; Indian and Australian education documents; summary of fees paid for courses in Australia; utilities bills; Indian property and farming documents; registration and stamp duty documents for Indian assets; applicant's Australian income statements; declaration of Yelavarthy Udaya Laxmi, the applicant's mother; declaration of Yelavarthy Surya Prakash Rao, the applicant's father.
9. The Tribunal also considered relevant submissions made to the Department including the applicant's written response to the Department's natural justice letter of 26 October 2020.
10. The Departmental delegate made the following findings in the decision record of 16 May 2022:
 11. There is evidence before the Minister that the applicant has provided, or caused to be provided, a bogus document or false or misleading information in relation to this visa application.
 12. The Department has conducted checks to confirm the information that you provided in your application.
 13. During this process we have uncovered unfavourable information which does not support your application.
 14. You lodged an application for a further Student Visa (TU500) on 05/08/2020.

15. An education loan document in your father's name from State Bank of India, Banaganpalle branch dated 24/07/2020.

16. The Department conducted checks to confirm the veracity of this document provided with your student visa application. The Department has received information that confirms that the financial document is non-genuine and therefore a bogus document.

17. It is therefore suspected that the financial documents provided with your Student (Class TU Subclass 500) visa is bogus as per s.5 (1) of the Migration Act 1958:

18. Bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

19. ...

20. On 26/10/2020 the Department sent you a S57 Natural Justice letter inviting you to comment on the information above regarding the financial document in question.

21. On 26/10/2020 you uploaded a statement in response to the Departments Natural Justice letter. This response has been read and considered as part of the decision making process.

22. In your response you have stated the following: *"In my own words, I believe that those documents are submitted to my parents, and my parents have sent to me. I am replying to the department that I am not aware of the previously submitted loan letter is genuine or not. he would never give a false document or make a misleading statement, the document which has been given by my parents submitted to the department. I believe that document my parents gave to the department was true."*

23. The Department referred to the declaration the applicant agreed to in his application for a student visa that placed the onus on him to ensure that the documents provided were genuine. Based on the evidence and information before them the delegate found the applicant had given a bogus financial document within the meaning of section 5(1) of the Migration Act.

24. *Section 359A letter – invitation to comment or respond to information*

25. On 21 April 2023 the Tribunal wrote to the applicant as follows:

26. I am writing on instruction from the Member conducting your review, in relation to the application for review made by you in respect of a decision to refuse to grant a Student (Temporary) (Class TU) visa.

27. In conducting the review, we are required by the *Migration Act 1958* to invite you to comment on or respond to certain information which we consider would, subject to your comments or response, be the reason, or a part of the reason, for affirming the decision under review.

Please note, however, that we have not made up our mind about the information.

The particulars of the information are:

□

- The Department issued a non-disclosure certificate and notification under s 375A of the Migration Act in relation to information it received about your visa application, and its written records concerning that material. The Tribunal is unable to disclose the material

that is the subject of the certificate as it would be contrary to the public interest. You are invited to make submissions on the validity of the s 375A certificate.

- The information covered by the s 375A certificate relates to the Department's investigative methods for document verification and applies to documents you provided in support of your visa application. You are invited to comment on the nature of the information the s.375 certificate refers to.

The Tribunal considers a public interest reason is clearly specified on the face of the S 375 non-disclosure certificate and the certificate is valid. The information covered by the certificate is relevant to the application for review because it led the Department to find that you had provided bogus documents as part of your visa application.

28. You are invited to give comments on or respond to the above information in writing.

29. On 27 April 2023 the applicant responded to the invitation but did not comment on the validity of the s 375A certificate, or the information it refers to. Instead, the applicant provided an explanation for what he said occurred when his parents applied for a bank loan to support his studies in Australia. The Tribunal considered those arguments in its consideration of the substantive issues in the applicant's case. The Tribunal considers the s 375A non-disclosure certificate issued by the Department is valid.
30. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

31. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 500.217(1) for the grant of the visa. Broadly speaking, this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
32. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver

does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

33. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
34. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
35. While PIC 4020 refers to information that is false, in the sense of purposefully untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
36. In his response to the Department's natural justice letter the applicant claimed his parents were unable to contact the broker who assisted with the loan arrangements in India. The applicant referred to COVID-19 and claimed that they had difficulty contacting the bank manager but have since found out the broker cheated them. The applicant advised new loan documents had been obtained and asked that they be considered. With his written response the applicant submitted further financial documents, statements by his father, and evidence of land ownership and valuation in India.
37. The applicant's written statement to the Tribunal of 27 April 2023 states his parents in India handled the arrangements for an education loan and advises they may have gone to the bank or a to a broker. The applicant claimed both he and his parents are the victims of a fraud. In his explanation the applicant claimed that during COVID-19 he did not think other students had to submit financial documents and was confused as to why he had to do so. The applicant also stated: *"I had to submit the documents, but they were not fraudulent. My parents were the ones who were deceived..."* and claimed he was not involved in submitting fraudulent documents.
38. The applicant's representative provided a written submission dated 3 May 2023 setting out the background to the application, a summary of the delegate's decision and the applicant's own background. The applicant's arguments are that the education loan documents were provided by his father and were in his father's name; the applicant did not check the authenticity of the document; even if he wanted to verify them, the bank would not disclose the information to him; and his father should have verified the documents but trusted the broker. It was also argued that since the loan letter is in the name of the applicant's father, the applicant did not make any mistakes and should not be held accountable for any "discrepancies" in the loan document that he did not have control over and was not related to his personal information. The argument continued that if the applicant's educational qualifications, work experience, or personal identity documents are found to be fraudulent, the Department may consider it misleading and fraudulent but there is a difference when

documents are unrelated to personal information and could “impact their visa application’s credibility”. It was submitted the applicant’s father has limited knowledge of banks and loans, and both the applicant and his father are innocent.

39. The representative’s submission includes claims about the applicant’s study history in Australia and the challenges he has faced. It asserted the applicant has a strong incentive to return to India and has no incentive to remain in Australia or engage in fraudulent activities.
40. At the Tribunal hearing the applicant gave an account of what he said occurred in arranging an education loan with the State Bank of India. He claimed his father is not well educated and the documents came through a broker. The applicant stated there was no intention to submit bogus documents. He referred to COVID-19 and declared his father could not go out to a bank in person, so the bank facilitated the loan through the broker. When asked how he was to access the funds, the applicant said the money was to go into his parents’ bank account and it would then be sent to him. The applicant claimed there was an initial deposit by the bank into an account and an expectation that the loan would happen, but it did not.
41. The applicant agreed the document was not genuine but claimed his parents had not realised. The Tribunal put to the applicant that it was his responsibility to ensure he did not provide bogus documents. The applicant stated at the time it was impossible for his parents in India to go out, and they did not notice anything fraudulent.
42. The Tribunal considered the applicant’s submissions and arguments in support of his application for review. Regarding the applicant’s statement that he was confused as to why he was required to provide financial evidence when he claims other students were not, the Tribunal notes that in accordance with cl 500.214(3) of the Migration Regulations, the Minister may require an applicant at any time to provide evidence of financial capacity that satisfies the requirements specified in the relevant statutory instrument. In the applicant’s case, the Minister did require him to provide evidence of his financial capacity.
43. The Tribunal reviewed the applicant’s claims that a broker was engaged to facilitate a bank loan and had provided a bogus document to the applicant’s father without their knowledge. The Tribunal finds these circumstances would not absolve the applicant of the responsibility to ensure documents submitted in support of his visa application are genuine. It is not sufficient for an applicant to leave arrangements to a broker or other third party and assert the other party was responsible for providing fraudulent documents. The requirement not to provide a bogus document or false or misleading information applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
44. The Tribunal does not accept the argument put forward that the applicant should not be held accountable for the provision of bogus documents because they were not in his name, and they were not related to his personal information such as identity, or education or work experience documents. As evidence of his financial capacity, it was permissible for the applicant to provide evidence of funds held by a family member which the applicant did. If the Department is concerned about the authenticity of such documents, they may take steps to verify whether the documents are genuine. This is what occurred in the applicant’s case, and the Tribunal accepts the Department made inquiries and found the education loan document in his father’s name from State Bank of India was bogus.
45. For these reasons, the Tribunal concludes there is evidence the applicant has given, or caused to be given, to the Minister, a ‘bogus document’ as defined in s 5(1), that is, a document that the Tribunal reasonably suspects is counterfeit or has been altered by a person who does not have authority to do so whether or not made knowingly in relation to the visa application.

46. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

47. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
48. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
49. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
50. The applicant provided documents and submissions to the Tribunal about his circumstances including his education history and desire to complete his studies in Australia. The applicant did not make any claims that address whether there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen that justify the granting of the visa in his case.
51. Therefore, the requirements of PIC 4020(1) should not be waived.
52. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217(1).
53. There is no evidence the applicant meets the criteria for any other subclass within the class of visa.

DECISION

54. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Wendy Banfield
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...